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No. 99-806

In The

Supreme Court of the United States

LISA GRANBERRY, COSETTI JORDAN, ALICE GLASSPOOL, CHRISTOPHER GLASSPOOL,

Petitioners,

On behalf of themselves and all others similarly situated,

v.

ISLAY INVESTMENTS, a California General partnership, MARVIN TREVILLIAN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

REPLY TO BRIEF IN OPPOSITION

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

I. RESPONSE TO ISLAY'S POINT "A": THE PETITIONERS HAVE STANDING TO RAISE BEFORE THIS COURT THE CONSTITUTIONAL INFIRMITY OF THE CLASS JUDGMENT

Respondents ("Islay") contend that petitioners lack standing to assert the rights of absent class members because the named plaintiffs either had no individual claim left or failed to pursue their individual claim through the trial court claims process. Additionally, Islay contends that this Court's class action jurisprudence precludes the named plaintiffs in a plaintiffs' class action from asserting a claim of violation of due process rights of absent class members – that such claims may only be brought by the absent class members themselves in proceedings collaterally attacking the judgment in the underlying action. Islay cites to footnote 6 in this Court's decision in *Zablocki v. Redhail*, 434 U.S. 374, 380 (1978) where the Court held that the Appellant lacked standing to challenge the sufficiency of notice to absent members of the *defendant class* for which appellant had been made class representative in the District Court.

Islay's citation to *Zablocki* is noteworthy because in *Zablocki* the plaintiffs had moved for the certification of a defendant class of all County Clerks in the State of Wisconsin, appellant Zablocki had not contested the certification of the defendant class, the legal issue concerned the constitutionality of a Wisconsin statute limiting the availability of marriage licenses, and the appellant and his class of County Clerks were represented before the Court by the Wisconsin Attorney General. The facts do not

suggest that any County Clerk had an individualized factual defense to the action for which *Zablocki* was not an adequate representative, nor that the Wisconsin Attorney General could not adequately represent the interests of all of the state's county clerks.

In contrast, at no time did Islay ever move in the California Courts to certify a class of tenants as cross-defendants or as parties to offset claims, or to establish that the Petitioners could act as adequate named representatives of such a class. To the contrary, Petitioners repeatedly opposed affirmative claims against individual absent class members on the ground that the class members were not present before the court and the named representatives could not adequately represent them on Islay's individual affirmative claims in their absence. These basic differences between the procedural posture in *Zablocki* and the procedural posture in the state courts below here demonstrate why *Zablocki* is inapplicable.[1]

Islay also cites to an opinion of the Court of Appeals for the Ninth Circuit in *Epstein v. MCA*, 126 F.3d 1235 (9th Cir. 1997) (*"Epstein II"*) as supporting its contention that an inadequate representation claim should be brought only by the absent class member in a collateral proceeding. The opinion cited by Islay was withdrawn by the Ninth Circuit and replaced with a decision reversing the holding of the decision Islay cited. *Epstein v. MCA*, 179 F.3d 641 (9th Cir. 1999) (*"Epstein III"*).

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[1] It should also be noted that both the Court's holding in *Zablocki* and a revision of the offending statute had made the issue whether the District Court judgment was binding on the absent County Clerks a possibly "academic" matter.

In *Epstein II* the Ninth Circuit had held that an absent class member could pursue a claim in federal court alleging inadequate representation by the class representatives in a Delaware state court class action proceeding. In *Epstein III* the Court changed its view, holding that *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 482 (1982) did not afford an absent class member a right of collateral attack:

> Simply put, the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court. See, e.g., *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1558 (3rd Cir. 1994) (refusing to allow absent class members collaterally to challenge adequacy of representation because the opportunity to challenge that determination by appeal to Delaware Supreme Court, and thereafter to the United States Supreme Court, "granted all the process that was due"); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 33 (1st Cir. 1991) (holding that so long as procedural safeguards were employed, objections to the determinations of a certifying court had to be remedied on appeal to the state supreme court or the United States Supreme Court, and not by recourse to the "federal courts in the vain pursuit of back-door relief").

Under the law of the Ninth Circuit as it exists today, it is highly doubtful that an absent member of the plaintiff class could obtain a review of the adequacy of state

court representation in the federal courts. The only viable opportunity for review is through Certiorari to this Court.

It is also paradoxical that Islay argues both that there was no error in the trial court in part because "Petitioners' counsel vigorously represented the class" (Brief in Opposition, page 17), and that Petitioners have no standing to represent the class for purposes of bringing a due process challenge in this Court.

Despite the absence of any certification of a defendant class, Islay asserts in its Brief in Opposition that the trial court found that the class members had caused damage to Islay in an aggregate amount that was "$1,411,000 in damages *in excess* of the total amount of the security." (Brief in Opposition, page 18, emphasis in original) Obviously, whatever damages Islay actually may have suffered were not caused by the class acting as a group, but by individual class members in their occupancy of individual units.

In the California Supreme Court in *Granberry III*, in the trial court, in the Court of Appeal, and in their Petition for Review to the California Supreme Court following the issuance of *Granberry IV*, Petitioners contended that the trial court could not make a determination of damages suffered by Islay at the hands of absent class members because those absent class members lacked adequate representation with respect to the facts of each individual offset claim that comprised the aggregate finding. Petitioners are the fiduciaries of the absent class members for whom they have consistently

raised this contention. Certiorari is the appropriate vehicle for Petitioners to fulfill their duty to challenge the state court procedures that denied due process to the absent class members.

II. RESPONSE TO ISLAY'S POINT "B": PETITIONERS PRESERVED THEIR CHALLENGE TO THE STATE COURT PROCEEDINGS

Islay contends that Petitioners have failed to preserve the issue of personal jurisdiction for review in this Court, citing to the California Court of Appeal decision in *Granberry IV*. (Petition, page App. 44) A review of the California appellate court's discussion of the personal jurisdiction issue on pages 44-45 shows, however, that the issue has been preserved throughout. Even though the state appellate court found that Petitioners had "acknowledged that the trial court has jurisdiction to resolve the affirmative defense of offsets," it did not hold that such acknowledgement constituted a procedural bar to raising the issue. Indeed, the Court of Appeal noted (Petition, page App. 45) that it changed its decision in *Granberry II* in response to Petitioners raising that issue.[2]

Most importantly, the parties to the litigation cannot by agreement confer personal jurisdiction on persons absent from the proceedings where the absent parties' interests are not being adequately represented. *Zenith*

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[2] What Petitioners acknowledged was that the trial court had *subject matter* jurisdiction to determine the offsets. Petitioners have never agreed that the trial court had *personal jurisdiction* to bind absent class members on Islay's affirmative offset claims.

Radio Corporation v. Hazeltine Research, Inc., 395 U.S. 100, 110-111 (1969), *Griggs v. Superior Court*, 16 Cal.3d 341, 344 (1976).[3] Hence, the finding in *Granberry IV* that Petitioners acknowledged the jurisdiction of the trial court cannot be dispositive of the issue.

Islay also contends that Petitioners failed to preserve the issue by not appealing the order granting class certification when it was issued in 1982. As noted in the Petition (page 4), when the trial court granted Petitioners' motion for class certification, Islay had not asserted any affirmative claims or defenses against absent class members. Thus, there was no reason to challenge the grant of class certification. Moreover, an order *granting* (as opposed to denying) class certification is not an appealable order in California. *Blue Chip Stamps v. Superior Court (Botney)*, 18 Cal.3d 381, 388 (1976), *Shelley v. City of Los Angeles*, 36 Cal.App.4th, 692, 696 (1995). Weill & Brown, *California Procedure Before Trial*, The Rutter Group, 1998, ¶¶ 14:105-106.

Lastly, Islay contends that the notice given to the absent class members per *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) "advised the absent class members that they would be represented by petitioners' counsel." (Brief in Opposition, p. 2) This statement goes to the core of the question Petitioners are presenting to this Court: Is *Eisen*-type notice to absent class members sufficient to satisfy due process where the defendant seeks individual offsets against absent class members raising unique individual

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[3] "The parties to a judicial proceeding cannot, either jointly or severally, effectively stipulate or concede that the court either has or lacks jurisdiction to act in the particular matter."

fact issues for each class member, where there has been no determination that the representative plaintiffs can adequately represent the absent class members on the offset claims, and when plaintiffs have continuously stated their incapacity to represent absent class members on the defense of the individual affirmative claims?

This Court has not addressed directly the extent, if any, to which procedures developed for prosecuting common or identical claims on behalf of a class may be relied upon to permit the adjudication of claims raised against those absent class members. The issues raised by this Petition go to the heart of the due process underpinnings for class action litigation. The resolution of those issues will obviously have great impact on the utility of the class action device for resolving legitimate class claims in both state and federal courts.

III. RESPONSE TO ISLAY'S POINT "C": THE PETITION PRESENTS SERIOUS QUESTIONS AFFECTING CLASS MEMBERS' DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION

In footnote 1 of Islay's Brief in Opposition, Islay states that "[t]he California Courts did not decide any of petitioners' alleged federal questions." This statement is patently untrue.

As previously noted, the *Granberry IV* decision, citing *Phillips Petroleum Co. v. Shutts, supra,* 472 U.S. 797, 811-812, held expressly that petitioners' due process challenge to the offset determination procedure had been determined against petitioners by the California Supreme

Court in *Granberry III.* (Petition, pages App. 44-45). The California Supreme Court denied review of the *Granberry IV* decision, thereby impliedly ratifying the *Granberry IV* characterization of the California Supreme Court's ruling in *Granberry III.*

IV. THE ADJUDICATION OF ADVERSE CLAIMS AGAINST ABSENT UNREPRESENTED CLASS MEMBERS, AND THE SUBSEQUENT EXTINGUISHMENT OF THE ESTABLISHED DEBT OWED BY ISLAY TO THOSE ABSENT CLASS MEMBERS, CONSTITUTED FUNDAMENTAL FAILURES OF DUE PROCESS PROTECTIONS THAT THREATEN THE EFFECTIVE UTILIZATION OF CLASS ACTIONS IN ALL STATE AND FEDERAL COURTS

The trial court adjudicated individualized claims against thousands of absent class members who could not and were not adequately represented by the named class representatives for purposes of defending such claims. After granting defendants every individual claim in its entirety, the trial court was faced with the task of deciding what to do with the remaining money still owing by defendants to the absent class members. Exercising a lawless and unfettered discretion, the trial court chose to extinguish defendants' debts to the absent class members without reference to any cognizable legal or equitable principle.

The actions of the trial court, approved and ratified by the California Appellate Courts, ran roughshod over the due process rights of absent class members that this

Court has repeatedly warned must be assiduously protected. It is plain from the appellate court record in this case that the California Courts have read the published opinion of the California Supreme Court in *Granberry III* as granting permission to trial courts to adjudicate affirmative claims raised by a class action defendant against absent class members, even where it is obvious that the class representatives could not adequately represent absent class members on the defense of the individual claims asserted against them. It is further plain from the state appellate court record in this case that trial courts in California have unfettered discretion to extinguish lawful debts arising in the context of a class action, and to do so without reference to any rule of law or established equitable principles.

These "innovations" in class action procedure adopted in defiance of this Court's class action jurisprudence threaten the continued utility of class actions as a means for litigating common issues of law and fact and for providing a remedy where large numbers of individuals have valid claims too small to make individual litigation practicable. If defendants in class actions may assert claims against absent class members and have trial courts adjudicate such claims without affording the individual class member affected the same opportunity to appear and defend that would be available if the defendant asserted the claim in an individual action, the temptation to assert spurious claims or claims of questionable validity will be irresistible. The knowledge that few absent class members will actual appear to contest their individual claims, while the majority of claims are adjudicated by default in favor of the class action defendant, will

insert yet another tool for injustice into class action procedures that already have their fair share of problematic practices.

Similarly, if a judgment establishing money damages at law in favor of absent class members can be undone by a defendant's appeal to the trial judge to exercise an unfettered discretion to excuse the defendant from its legal obligations, the rule of law will be replaced by the personal caprice of trial judges. The extensive and extended litigation often required for the assertion of class action claims will become an exercise in futility if the discretion afforded trial judges to shape an equitable remedy for the absent class members becomes a power to nullify the class members' legal rights for which the class representative sought vindication.

V. CONCLUSION

The Court should grant the Petition for Certiorari on the questions presented.

Respectfully submitted,

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